

**FILED**

DISTRICT COURT OF GUAM

JAN 16 2007 RSN

MARY L.M. MORAN  
CLERK OF COURT

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Attorneys for United States of America

IN THE UNITED STATES DISTRICT COURT  
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEN YUEH LU,

Defendant.

MAGISTRATE CASE NO. 06-00031

UNITED STATES RESPONSE TO  
DEFENDANT'S MOTION TO  
MODIFY RELEASE CONDITIONS

Defendant has filed a "motion for modification of release bail conditions." Defendant appeared before the Honorable Joaquin V.E. Manibusan on December 13, 2006, whereupon the court allowed his release from custody upon condition that he post \$5,000, surrender his passport to the clerk of the court, and remain on Guam. Title 18, U.S.C. § 3145(a)(2) provides that a person who has been released by a magistrate "may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release." Title 18, U.S.C. § 3231 provides that the "district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." Accordingly, the government will treat this motion as a motion for amendment of conditions, to be heard before the district court.

Defendant is charged with a violation of the Magnuson Act, specifically 16 U.S.C. § 1857(1)(D), for refusal to allow officials of the United States Coast Guard to board his vessel for

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1 purposes of enforcing this Act. Trial is set for February 2, 2007. Title 18, United States Code, §  
2 3142(b) requires the court to release a person on his personal recognizance or upon execution of  
3 an unsecured bond, “unless the judicial officer determines that such release will not reasonably  
4 assure the appearance of the person as required or will endanger the safety of any other person or  
5 the community.” Title 18, U.S.C. § 3142(c)(B) provides that if these conditions “will not  
6 reasonably assure the appearance of the person as required” the court shall order his pretrial  
7 release “subject to the least restrictive further condition, or combination of conditions, that such  
8 judicial officer determines will reasonably assure the appearance of the person as required ... .”

9 It is undisputed that defendant is a citizen of Taiwan, and that he has no ties of any kind  
10 to the United States. It is also undisputed that he is charged with a misdemeanor, for which  
11 extradition is not available should he leave Guam and fail to appear for trial.

12 Defendant appears to argue (as set forth in his Petition for Writ of Habeas Corpus, Civil  
13 Case No. 06-00039) that he should be allowed to leave Guam because he is innocent. Obviously,  
14 that is what a trial is for; § 3142 does not permit a mini-trial on the merits of the case.

15 Next, defendant asserts that the Law of the Sea Treaty (LOS), Article 73.3 requires that  
16 he be released unconditionally after posting a reasonable bond. Article 73 provides in pertinent  
17 part as follows:

18 ENFORCEMENT OF LAWS AND REGULATIONS  
19 OF THE COASTAL STATE

- 20 1. The coastal State may, in the exercise of its sovereign rights to  
21 explore, exploit, conserve and manage the living resources in the  
22 exclusive economic zone, take such measures, including boarding,  
23 inspection, arrest and judicial proceedings as may be necessary to  
24 ensure compliance with the laws and regulations adopted by it in  
25 conformity with this Convention.  
26 2. Arrested vessels and their crews shall be promptly released upon  
27 the posting of reasonable bond or other security.  
28 3. Coastal State penalties for violations of fisheries laws and regulations  
in the exclusive economic zone may not include imprisonment, in the  
absence of agreements to the contrary by the States concerned, or any  
other form of corporal punishment. (Emphasis added.)

Although LOS was signed by the president and sent to the Senate in 1994, the Senate has  
not ratified it. Accordingly, it does not have the force of law. United States v. Best, 304 F.3d

1 308, 315 (3<sup>rd</sup> Cir. 2002). Even if it did, the treaty would not give defendant any standing to assert  
2 rights under it. Treaties are contracts between nations. Nothing in LOS indicates that it creates  
3 rights that are privately enforceable by individuals, nor has the defendant cited any such  
4 authority in his support.

5 Furthermore, even if LOS did apply to the United States, and even if it did give a remedy  
6 for private parties, it would not advance defendant's position. LOS specifically provides that the  
7 crew "post reasonable bond." Reasonable bond for what? The appearance in a civil matter?  
8 LOS concerns violations of fisheries laws and regulations, and the posting of bonds when a  
9 vessel (and necessarily its crew) has been seized. Defendant is not being charged with violating  
10 any fisheries regulation, but rather with failing to obey a lawful order from the U.S. Coast Guard.  
11 He has cited no authority for his position that this section of the treaty applies to individuals  
12 charged with criminal matters unrelated to illegal fishing.

13 Furthermore, the only bond posted in the civil forfeiture case concerns the vessel itself.  
14 The Marshals 201 has been released on bond, as reflected by Exhibits 1, 2, and 3, but the \$2.95  
15 million does not cover the crew. The only bond to ensure the defendant's appearance is the  
16 \$5,000 posted in this case.

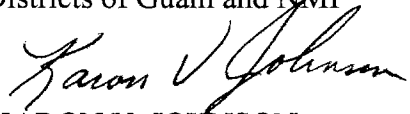
17 Thus, the issue boils down to the question, whether a \$5,000 bond, standing alone, is  
18 sufficient to ensure defendant's appearance for trial. The court may find it useful to inquire of the  
19 defendant, whose \$5,000 cash was paid into court? The point of a bond is to create a financial  
20 incentive for the defendant to appear for trial. The amount is set so as to make its forfeiture  
21 economically painful to the defendant. If this \$5,000 was posted by the vessel's owner, the  
22 Marshall Islands Fishing Company, then it provides no personal incentive to secure the  
23 defendant's appearance. Should he refuse to return for trial and the court forfeit the bond, the  
24 company could not even take it out of his paycheck, because defendant is no longer an employee.

25 It is in the company's interest that defendant not appear for trial. Should he be convicted,  
26 the jury would have had to find that the Marshals 201 was within the U.S. EEZ, a finding which  
27 would collaterally estop the company from contesting this element in the forfeiture case. Five  
28 thousand dollars would be a small price to pay, to avoid such a disaster in the civil suit

1 Thus, the government believes the initial inquiry in this matter should be, whose money  
2 has been posted for defendant's bail. If it is that of the Marshall Islands Fishing Company, it is  
3 obviously insufficient to secure his appearance. If it his own, then the question is whether is it  
4 sufficient, without any other restrictions, to secure his appearance. The government's position is  
5 that, given the enormous financial stakes of the civil case, defendant's present release conditions  
6 should remain unchanged.

7 Respectfully submitted this 16<sup>th</sup> day of January, 2007.

8 LEONARDO M. RAPADAS  
9 United States Attorney  
Districts of Guam and NMI

10   
11 By: KARON V. JOHNSON  
12 Assistant U.S. Attorney  
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4 Attorneys for Defendant:  
5 **MARSHALLS 201**

**FILED**  
DISTRICT COURT OF GUAM

OCT 18 2008

MARY L.M. MORAN  
CLERK OF COURT

6 **UNITED STATES DISTRICT COURT**  
7 **FOR THE TERRITORY OF GUAM**

9 UNITED STATES OF AMERICA, )  
10 )  
11 Plaintiff, )  
12 v. )  
13 MARSHALLS 201, )  
14 )  
15 Defendant. )

CIVIL CASE NO. 06-00030

**STIPULATED MOTION FOR  
RELEASE OF VESSEL AND  
APPROVAL OF BOND IN LIEU  
OF ARREST**

17 **STIPULATED MOTION FOR RELEASE OF VESSEL**  
18 **AND APPROVAL OF BOND IN LIEU OF ARREST**

19 Comes Now Defendant MARSHALLS 201 and Plaintiff UNITED STATES OF  
20 AMERICA, by and through counsel undersigned, respectively and move this Court by Stipulation  
21 for approval of bond in lieu of arrest of the Vessel Defendant Marshalls 201. The Stipulated  
22 Motion is based upon the agreement of counsel for Plaintiff and Defendant, and stipulated  
23 proposed Orders and prior orders, pleadings and record herein.

24 This Stipulated Motion is based upon Local Rule 65.1.1(f) and Rule E(5)(c) of the  
25 Supplemental Rules for Certain Admiralty and Maritime claims. Defendant submits a  
26 \$2,950,000.00 bond in support of the Order approving release of the vessel. The value of the  
27 bond was stipulated and agreed to by discussion and exchange of the fair market value character  
28 of the vessel, its catch and equipment. The parties submit that the \$2,950,000.00 bond is the

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3  
4 equivalent of fair value for the vessel and that the vessel should be released from arrest and the  
5 tendered bond accepted in lieu thereof.

6 WHEREFORE, the parties stipulate to the instant motion for the court to approve  
7 the release of the vessel and accept the \$2,950,000.00 bond in lieu of arrest.

8  
9 **CONCLUSION**

10 Plaintiff and Defendant Marshalls 201 request that the Defendant Vessel Marshalls  
11 201 be released and the bond approved in lieu of arrest.

12 Dated this 12 day of October, 2006.

13 **BERMAN O'CONNOR & MANN**

14 Attorneys for Defendant *MARSHALLS 201*

15 BY:

  
16 **DANIEL J. BERMAN**

17 **SO STIPULATED:**

18 **OFFICE OF THE UNITED STATES ATTORNEY**

19 Attorneys for Plaintiff *UNITED STATES OF AMERICA*

20 BY:

  
21 **MIKEL W. SCHWAB, ESQ.**  
22 Assistant U.S. Attorney  
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28

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4 Attorneys for Defendant:  
5 **MARSHALLS 201**

6 **UNITED STATES DISTRICT COURT**  
7 **FOR THE TERRITORY OF GUAM**

8 UNITED STATES OF AMERICA, )  
9 )

10 Plaintiff, )

11 v. )

12 )  
13 MARSHALLS 201, )

14 Defendant. )  
15

CIVIL CASE NO. 06-00030

**CERTIFICATE OF SERVICE**

16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on the 12th day of October, 2006, I caused to be served a copy  
18 of the Stipulated Motion For Release of Vessel and Approval of Bond in Lieu of Arrest,  
19 on the following:

20 **VIA HAND DELIVERY**

21 Mikel W. Schwab, Esq.  
22 Office of the United States Attorney  
108 Hernan Cortes Avenue, Suite 500  
23 Hagåtña, Guam 96910

24 Dated this 12th of October, 2006.

25  
26 BY: 

**DANIEL J. BERMAN**

27  
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7 Attorneys for Defendant:  
8 **MARSHALLS 201**

**FILED**  
DISTRICT COURT OF GUAM  
OCT 13 2006  
MARY L.M. MORAN  
CLERK OF COURT

9 **UNITED STATES DISTRICT COURT**  
10 **FOR THE TERRITORY OF GUAM**

11 **UNITED STATES OF AMERICA,**

CIVIL CASE NO. 06-00030

12 **Plaintiff,**

13 **v.**

14 **MARSHALLS 201,**

15 **Defendant.**

~~Proposed~~ **ORDER GRANTING  
APPROVAL OF RELEASE  
OF VESSEL AND FILING OF  
RELEASE BOND**

16 Pursuant to Local Rule 65.1.1(f) and Rule E(5)(c) of the Supplemental Rules  
17 for Certain Admiralty and Maritime Claims, upon application by the Claimant, the  
18 Marshall Islands Fishing Company and consent by Plaintiff, the United States of  
19 America, for release of the vessel and substitution in rem of a release bond in the  
20 amount of U.S. TWO MILLION NINE HUNDRED FIFTY THOUSAND DOLLARS  
21 (\$2,950,000.00),

22 IT IS HEREBY ORDERED THAT the application is granted, and that the  
23 claimant shall fulfill the obligations set forth in the Release Bond and pay the amount,  
24 if any, awarded against the fishing vessel MARSHALLS 201.

25 *Pursuant to GR 8.1, parties are to submit a subsequent proposed*  
26 *order regarding deposit and interest bearing directions.*

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1 USA V. MARSHALLS 201  
2 [Proposed] ORDER GRANTING APPROVAL OF RELEASE  
3 OF VESSEL AND FILING OF RELEASE BOND

CV06-00030  
PAGE 2

4 IT IS SO ORDERED.

5 DATED: 10-13-2006

6  
7   
8 **HONORABLE JOAQUIN VERMAN**  
9 **U.S. MAGISTRATE JUDGE**  
10 **FRANCES TYDINGCO-GATEWOOD**  
11 **Designated Judge**

12 SO APPROVED:

13 **BERMAN O'CONNOR & MANN**

14 Attorneys for Defendant MARSHALLS 201

15 BY:   
16 **DANIEL J. BERMAN, ESQ.**

17 **OFFICE OF THE UNITED STATES ATTORNEY**

18 Attorneys for Plaintiff UNITED STATES OF AMERICA

19 BY:   
20 **MIKEL W. SCHWAB, ESQ.**

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22 **RECEIVED**

23 OCT 13 2006

24 **DISTRICT COURT OF GUAM**  
25 **HAGATNA, GUAM**

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7 Attorneys for Defendant:  
8 **MARSHALLS 201**

**FILED**  
DISTRICT COURT OF GUAM

OCT 17 2006

**MARY L.M. MORAN**  
CLERK OF COURT

9 **UNITED STATES DISTRICT COURT**  
10 **FOR THE TERRITORY OF GUAM**

11 UNITED STATES OF AMERICA, )

CIVIL CASE NO. 06-00030

12 Plaintiff, )

13 v. )

**STIPULATION TO ORDER**  
**RE: G.R. 8.1**

14 MARSHALLS 201, )

15 Defendant. )

16 **STIPULATION TO ORDER RE: G.R. 8.1**

17  
18 Comes Now Defendant MARSHALLS 201 and Plaintiff UNITED STATES OF  
19 AMERICA, by and through counsel undersigned, respectively, and stipulate to an Order regarding  
20 the deposit in Court of the Bond for the Release of the Vessel. This Stipulation is based upon  
21 General Rule 8.1 Deposits in Court - Responsibility of the Clerk. The parties stipulate as follows:

22 1. The Clerk shall deposit the money in a financial institution insured by the  
23 Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.  
24 The Clerk may also invest such money in the United States treasury bills. G.R. 8.1(c).

25 2. The Clerk shall deposit the money as soon as practicable following service  
26 of a copy of this Order. G.R. 8.1(d).

27 3. The Clerk shall deposit the amount of TWO MILLION NINE HUNDRED  
28 FIFTY THOUSAND DOLLARS (\$2,950,000.00) into an interest bearing account, said funds to

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**US Attorney's Office**  
**Districts of Guam & NMI**

OCT 17 2006

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remain on deposit pending further order of the Court. G.R. 8.1(e)(1).

4. Defendant's counsel presenting this Order shall personally serve a copy hereof on the Clerk of Court or the Chief Deputy Clerk. G.R. 8.1(e)(a) and (1).

**IT IS SO STIPULATED:**

**BERMAN O'CONNOR & MANN**

Attorneys for Defendant *MARSHALLS 201*

BY:

 10/13/06  
DANIEL J. BERMAN, ESQ.

**OFFICE OF THE UNITED STATES ATTORNEY**

Attorneys for Plaintiff *UNITED STATES OF AMERICA*

BY:

  
MIKEL W. SCHWAB, ESQ.

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